my mind, having regard to the delay of the deceased herself in seeking medical attention, the grossly heavy dose of the eserine ingested into an empty or nearly empty stomach, the readily absorbable and deadly nature of the poison, the partially effective result of atropine as the antagonist of choice and the doubtful advantage of administering gastric lavage, I do not think that by merely proving that the gastric lavage could have been administered at the casualty room some 2-3 minutes before it was actually administered in the ward, the plaintiff had discharged the onus which is on him, even on a balance of probability, to establish negligence on the part of the hospital authorities or of Dr. Kooi or any of its other servants through any delay occasioned by not administering the gastric lavage in the casualty room.

The defendant's alleged breach of the statutory provisions of Federal Subsidiary Legislation No. 440 of 1952 has been conceded by counsel for the plaintiff as being inapplicable.

In the result, the plaintiff has failed to prove any of the particulars of negligence in his statement of claim. The claim is therefore dismissed with costs.

Claim dismissed.

Solicitors: *Mahendran & Co.*

V.A.M. HUSSAIN v. BP MALAYSIA SDN. BHD.

[F.C. (Azmi L.P., Suffian and Ali F.JJ.) March 2, 1970]

[Kuala Lumpur — Federal Court Civil Appeal No. X83 of 1969]

Land Laws — Charge — Principal sum payable on demand — Form of demand — Payment of interest — Discretion of court — Civil Law Ordinance, 1956, s. 11 — National Land Code, 1965, s. 255 and Form 16E.

This was an appeal against the judgment of the High Court in favour of the respondent on a claim for $45,000 secured by a charge on land. The principal sum secured by the charge was payable on demand and this was made in Form 16E. In the form demand was made of the principal sum due and interest.

Held, dismissing the appeal: (1) in this case as the principal sum secured by the charge was payable on demand. the respondent had used the correct form, *i.e.* Form 16E;

(2) the inclusion of interest in the Form 16E did not make the notice defective;

(3) the court had a discretion to award interest under section 11 of the Civil Law Ordinance and the learned judge had rightly exercised his discretion in this case, but despite the bank rate the rate of interest should be the rate usually awarded by the court, namely, 6%.

FEDERAL COURT.

K. Rajanayagam for the appellant.

Tan Jake Lian for the respondent.

Cur. Adv. Vult.

Azmi L.P.: I have read the judgment of my brother Suffian F.J. I agree with him that the appeal should be dismissed with costs but the rate of interest be reduced from 8 to 6 per cent.

The deposit of $500 will be paid to the respondent towards his taxed costs.

Suffian F.J.: The appellant had a piece of land 36.45 poles in area on the Klang Road in Kuala Lumpur. BP Malaysia thought it a good site for a filling and service station commonly known as a petrol pump. They agreed to buy it for $90,050. They also agreed to advance the appellant $45,000. If the city government had allowed a petrol pump to be built on the land, we would have heard nothing more about this matter, but they did not allow it.

At the time of the transaction BP on 13th July, 1967, entered into an elaborate written agreement with the appellant. It is clear from the terms of that agreement that BP were interested in the land only for use as a site for a petrol pump. The appellant was to cooperate in obtaining permission. Then there is clause 13 of the agreement which provides—

"In the event of the said building plans of BP being disapproved by the relevant authority ... all moneys paid by BP to the vendor ... [this was a reference to the $45,000] shall forthwith be refunded by the vendor [appellant] to BP and this agreement shall be at an end and of no further effect."

To further protect themselves, on the same day BP had the land charged to them to secure repayment of the $45,000. Clause 1 of the annexure to the charge states simply —

"The chargor [appellant] shall on demand in writing by the lender [i.e., BP] repay to the lender without interest the said sum [of $45,000]..."

Clause 2 says —

"Any demand for payment of the moneys intended to be hereby secured may be made by a notice in writing in such form as may be prescribed by or under the National Land Code..."

When planning permission was refused, BP on 26th February, 1968, sent the appellant a notice in Form 16E of the National Land Code demanding payment of the $45,000 within one month. The appellant did not pay and so on 9th July, 1968, BP took out an originating summons for an order that the land be sold to satisfy the sum of $45,000 together with interest at the rate of 8% per annum from 28th February (not the date of the advance but the date when the notice is thought to have reached the appellant) to the date of payment.

On 20th June, 1969. BP won the order sought and the appellant appeals.

The first point taken that the charge (on which the originating summons was taken out) and the agreement should be read together and until the agreement is terminated the charge which was made pursuant to clause 5 of the agreement cannot be enforced. I do not think there is anything in this. Clause 13 of the agreement plainly says that in the event of building plans being disapproved by the relevant authority the $45,000 shall forthwith be refunded and *"this agreement shall be at an end and of no further effect."*

It is next argued that in fact building plans had not been disapproved within the meaning of clause 13

and until then the $45,000 is not refundable. The facts relevant to this argument are as follows. It is not disputed that so far no *building* plans had been submitted, only *lay-out* plans. They were rejected by the Chief Planning Officer of the city government. This was on 24th January, 1968. Then on 1st February the appellant appealed to the same officer against this decision. This was done with BP's knowledge and consent. On 17th April, 1968, the appellant was told that his appeal had been rejected and he made yet a second appeal to the Minister for Local Government and Housing also with BP's knowledge and consent and no decision has yet been made on this appeal. It is said that until a decision has been made on this appeal adverse to the appellant he is not liable to refund the $45,000 and the issue of the originating summons on 9th July, 1968 (4½ months after issue of Form 16E and more than two months after appeal to the Minister) was void. I do not think that there is anything in this argument. The undisputed fact is that BP are interested in the land only as a site for a petrol pump and to this day no permission has been given to build a petrol pump on it.

It is then argued that the notice given to the appellant on Form 16E was wrong and that it should have been on Form 16D. There is no merit in this argument. Form 16D should be used, in the words of section 253 of the National Land Code, only where there has been "a breach by the chargor of any of the agreements on his part", and the object of using that form is to specify the breach in question so as to give the chargor an opportunity of remedying the breach. Here BP do not allege that there has been a breach by the appellant of any of his agreements, which breach is within the appellant's power to remedy. All that BP allege is that building permission could not be obtained. That being the case, clause 13 of the agreement springs into play, the agreement automatically came to an end and it was open to BP to demand repayment of the $45,000. This they did and according to section 255(1) of the Code where the principal sum secured by a charge is payable on demand the proper notice to issue should be on Form 16E.

It is next argued as follows: that it was for BP to obtain approval for plans submitted, that there is no "approved plan" for Kuala Lumpur and therefore it is unnecessary in law for lay-out plans to be submitted, that the area being unzoned (there was no dispute about this) no town planning permission is required before building plans are submitted, that no building plans have been submitted and until they have been submitted and disapproved, the $45,000 is not refundable. I reject this argument. I agree with BP's counsel that the obtaining of planning permission is part and parcel of the obtaining of approval for building plans and that the disapproval of planning permission is tantamount to disapproval of building plans.

The next arguments relate to interest. The charge states that the loan was to be repaid without interest and it is said that BP are not entitled to demand interest, and if at all they should get interest only from the date of judgment and at only 6%. Further it is said that Form 16E is only for demanding the repayment of principal only and the inclusion of interest on it was a substantial variation that made the notice defective. I do not think that the inclusion of interest made the notice defective. I also think that the learned judge was right to exercise his discretion under section 11 of the Civil Law Ordinance No. 5 of 1956 by awarding interest from the date when the notice reached the appellant, but I think that despite the bank rate the rate of interest awarded should be the rate usually awarded by the court, namely, 6 per cent.

I would therefore dismiss the appeal with costs but reduce the rate of interest from 8 to 6 per cent.

Ali F.J. concurred.

Appeal dismissed.

Solicitors: *K. Rajanayagam & Co.; Shook Lin & Bok.*

LAU FOO SUN v. GOVERNMENT OF MALAYSIA

[F.C. (Azmi L.P., Suffian & Ali F.JJ.) March 2, 1970]

[Kuala Lumpur — Federal Court Civil Appeal No. X92 of 1969]

Practice and Procedure — Appellate court — Further evidence — Principles on which received.

Evidence — Further evidence — Appellate court — Principles on which received.

To justify the reception of further evidence three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently creditable, although it need not be incontrovertible.

In this case the appellant applied for an order that he be at liberty upon the hearing of the appeal to adduce further evidence. The appellant intended to call a Mr. Callow, who was at the material time the chief architect at the Ministry of Education.

Held, dismissing the application: the appellant had not shown that the evidence he sought to adduce could not have been obtained with reasonable diligence for use at the trial.

Cases referred to:-

(1) *Ladd* v. *Marshall* [1954] 3 All E.R. 745.

(2) *Roe & Anor.* v. *Robert McGregor and Sons Ltd.*; *Bills* v. *Roe & Anor.* [1968] 2 All E.R. 636.

The following cases were also cited in argument: *Brown* v. *Dean* [1910] A.C. 373; 374; *Crook* v. *Derbyshire* [1961] 3 All E.R. 786, 788E, 791G and *Kesarmal & Anor.* v. *Valliappa Chettiar* [1954] M.L.J. 119.

FEDERAL COURT.

S. D. K. Peddie for the appellant.

Ajaib Singh (Senior Federal Counsel) for the respondent.

Azmi L.P.: I have read the judgment of my brother Suffian and I agree with him that this application be dismissed for reasons he gave.

It is apparent that Mr. Callow's evidence, if given at the trial would probably have an important influence